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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 157

CIVIL AERONAUTICS BOARD, PETITIONER

v.

STATE AIRLINES, INC.

No. 158

STATE AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD AND PIEDMONT AVIATION, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 675–686) is reported in 174 F. 2d 510. The original opinion of the Civil Aeronautics Board (R. 565) is reported in 7 C. A. B. 863. The Board's supple-

mental opinions (R. 568–588, 610–621) are reported in 8 C. A. B. 585 and 716.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1949 (R. 686–687). The petition for a writ of certiorari in No. 157 was filed by the Civil Aeronautics Board on July 1, 1949, and was granted on October 10, 1949.[1] The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an "area proceeding" held by the Civil Aeronautics Board for the dual purpose of (a) establishing such air routes in the area as are required by public convenience and necessity, and (b) selecting the best qualified applicant to operate those routes, the Board is precluded as a matter of law from awarding such routes to a qualified applicant who has not specifically applied for the routes established by the Board but has applied for routes in the same general area subject to "such modification of such routes as the Board may find public convenience and necessity require."

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[1] A petition for a writ of certiorari filed by Piedmont Aviation, Inc., Intervenor (No. 159), and a cross-petition filed by State Airlines, Inc., petitioner below (No. 158), filed on July 2, 1949, also were granted on October 10, 1949.

2. Whether the determination of the Civil Aeronautics Board that Piedmont Aviation, Inc., is "fit, willing, and able" to operate the air routes awarded it may be set aside as "unsupported by substantial evidence" because, in the independent judgment of the Court of Appeals, Piedmont's proposed organization and operational plans do not render it "fit" and "able" to operate the routes established by the Board.

3. Whether, where a Court of Appeals finds unlawful an order of the Civil Aeronautics Board awarding certain air routes to one applicant, the court is authorized by the Administrative Procedure Act to direct the Board to award these routes to another applicant.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401, *et seq.*, and the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, are set forth in Appendix A, *infra*, pp. 61 to 63.

STATEMENT

On February 24, 1945, the Civil Aeronautics Board (hereinafter called the "Board") consolidated for hearing in a single proceeding known as the "Southeastern States Case" some 45 applications by 25 companies proposing new and additional air transportation services. The applications included proposals for "trunkline" serv-

ices and local or "feeder"[2] services, and embraced an area[3] extending roughly from Maryland to Florida, and from the Atlantic Coast to the Mississipi River (R. 565 (866)[4]). The proceeding resulted from the practice of the Board of consolidating into one proceeding all route applications proposing service within a particular geographical area, and was one of eleven so-called "area proceedings" held before the Board.[5]

Various applicants for local or "feeder" service proposed routes which overlapped and duplicated each other in many respects, and when taken together blanketed the area involved (R. 638–654; see Map, Appendix B, *infra,* p. 64). Among these applicants were State Airlines, Inc. (hereinafter called "State") and Piedmont Aviation, Inc. (hereinafter called "Piedmont").

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[2] A local or "feeder" air route, in contrast to a trunkline route, is in general a route primarily serving small communities and tying them into the larger traffic centers with which they have their major community of interest. The service is normally rendered with small equipment and is primarily short haul in character.

[3] The area included the States of Virginia, West Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi; portions of Ohio, Indiana, Maryland, Florida, and Missouri, and the District of Columbia.

[4] Since many pages of the record bear the same number, individual pages cited will be further identified by placing the page number of the particular document in parenthesis following the record citation.

[5] *Annual Report of The Civil Aeronautics Board*, 1943, pp. 9–10.

Piedmont's application, as amended, sought a total of 5,763 miles of specifically described routes (R. 28–71, 652, 653). Of these routes, 1,404 miles consisted of a conventional passenger, property, and mail operation over a north-south route extending from Washington, D. C., to Columbia, S. C.; and east-west routes extending from Knoxville, Tenn., to Wilmington, N. C., and from Roanoke, Va., to Norfolk, Va. (R. 69–70, 652; see Map, Appendix B, *infra,* p. 64). The remaining 4,359 route miles proposed by Piedmont in the same general area consisted of a property-mail pick-up[6] operation over an extensive network of routes serving a larger area than its proposed passenger routes (R. 64–69, 653; see Map, Appendix B, *infra,* p. 64).

Piedmont's application included a so-called "catch-all" clause requesting authorization to engage in air transportation "on the routes detailed herein, or such modification of such routes as the Board may find public convenience and necessity require"; and the general prayer in the application asked "for such other and further relief, general and specific, under Section 401 of the * * * Act * * *, as the Board may deem appropriate, and to which the applicant may be entitled in any proceeding in which the

[6] Property "pick-up" service involves the use of aircraft equipped with a device for enplaning or deplaning property at a station without landing the aircraft.

application may be heard in part or in its entirety" (R. 31, 41).[7]

State's applications proposed twelve routes providing conventional passenger, property, and mail service to approximately fifty-five points over a network of routes blanketing much of the "southeastern" area, and reaching out as far as Richmond, Va., Jacksonville, Fla., Montgomery, Ala., Chattanooga, Tenn., Louisville, Ky., and Cincinnati, Ohio (R. 1–27, 654; see Map, Appendix B, *infra*, p. 64).[8]

An extensive hearing on all the applications in the proceeding was held before the Examiners in May and June of 1945 (R. 629 (6), 637). Evidence was introduced by the various local or "feeder" applicants to support the need for the local or "feeder" routes they proposed, and to show their individual qualifications for operating their routes, including evidence with respect to the previous aviation experience of the applicant and its officials, their available equipment and personnel, their financial resources, and their

[7] An amendment to Piedmont's original application eliminated certain proposals involving passenger service, but did not affect the remainder of its original proposal, including the "catch-all" clause (R. 62–71).

[8] On brief to the Examiners, and later to the Board, State indicated that it would seek consideration of only nine of its proposed twelve routes, thereby reducing from fifty-five to forty-four, the number of points it specifically proposed to serve, and reducing somewhat the general area covered by its proposed network or routes (see Map, Appendix B, *infra*, p. 64).

plans for operating the routes they proposed. In addition, exhibits, and in some instances oral testimony, were received from some forty interested cities and municipal organizations regarding the needs of particular localities for air transportation services.

On June 4, 1946, the Examiners issued their report recommending, *inter alia,* that the area be afforded four separate local or "feeder" routes, one of which was to go to State, and one to Piedmont (R. 519–522). Piedmont's recommended route consisted of a north-south segment between Washington, D. C., and Winston-Salem, N. C., and an east-west segment between Norfolk, Va., and Roanoke, Va. (R. 520). State's recommended route connected with that of Piedmont at Winston-Salem, N. C., but was in general a more southern route, consisting of north-south segments from Winston-Salem and Raleigh-Durham, N. C., to Columbia, S. C., and east-west segments from Morehead City and Wilmington, N. C., to Asheville, N. C., and Louisville, Ky. (R. 521–522).

On exceptions to the Examiners' report Piedmont objected, *inter alia,* to certain routes recommended for State (R. 533, 534). State contended, *inter alia,* that the Examiners "erred in granting to other applicants and failing to grant to State certain authority, which, although not specifically sought by State, would, if granted to State rather than other applicants, form a more

logical part of the operating authority recommended by the Examiners for State" (R. 529).

Following briefs and oral argument before the Board, the Board issued a decision, in which it determined, *inter alia,* that certain cities and regions required "trunk-line" services, and made appropriate amendments in the certificates of public convenience and necessity held by five "trunk-line" carriers. In addition, the Board found a need for two local or "feeder" routes (rather than the four recommended by the Examiners), one in the "southern area" which was awarded to Southern Airways, Inc., and another in the northern area. (R. 565.)

In selecting a carrier to operate the route in the northern area, the Board considered the qualifications of all the applicants (eleven in number) who had proposed service to any part of the route actually awarded. (See Map, Appendix B, *infra,* p. 64). It then narrowed its choice down to State and Piedmont, and after recognizing that the choice between these two applicants presented "a close and difficult question," the Board concluded that Piedmont was best qualified to operate the route and was "fit, willing, and able" within the meaning of section 401 (d) of the Civil Aeronautics Act (R. 565 (901–902, 907)). The choice of Piedmont over State essentially turned on the conclusion that Piedmont had superior operational experience, and possessed a well-rounded organization with key personnel familiar with the

area involved who could inaugurate certificated operations sooner than State (R. 565 (902)).

Piedmont's route, consisting of 1700 odd route miles, centered in the Carolinas and Virginias, and extended west of the Appalachians as far as Louisville, Ky., and Cincinnati, Ohio. (See Map, Appendix B, *infra,* p. 64.) The route was in some respects a consolidation of the two separate routes recommended by the Examiners for State and Piedmont, although somewhat less extensive in total route mileage and area served. Of the 26 points originally included in Piedmont's certificate, 9 had been specifically named in its proposed passenger operation and all but 6 had been specifically named in its pick-up proposal (R. 64–70; see Map, Appendix B, *infra,* p. 64). The extensive routes proposed by State had included 24 of the 26 points awarded to Piedmont (R. 1–27; see Map, Appendix B, *infra,* p. 64).

On petition for rehearing, reargument, and reconsideration, State urged, *inter alia,* that the award to Piedmont was unlawful in that (a) Piedmont had not applied for the major portion of the route, either specifically or by means of the general allegations in its application, and that therefore the award was beyond the Board's jurisdiction and denied State adequate notice and hearing, and (b) the Board's finding of "fitness, willingness, and ability" lacked the support of substantial evidence (R. 566). The Board then heard reargument limited to the questions of

"(a) whether the public interest requires the selection of State or Piedmont, and (b) whether the Board committed legal error by awarding the route to Piedmont" (R. 591).

On December 12, 1947, the Board issued a supplemental opinion reaffirming its award to Piedmont, and issued to Piedmont a temporary certificate for the route (R. 610–628). The Board found, *inter alia,* that Piedmont was clearly fit, willing, and able, that State had been afforded adequate notice and a fair hearing, and that in the light of Piedmont's "catch-all" clause and the customary practice in route cases before the Board, Piedmont was an "applicant" for the route awarded it (R. 611–619). On the relative merits of the two applications, the Board found that Piedmont had more diversified experience in aviation activities, that Piedmont was superior in repair and overhaul facilities and in maintenance personnel, and that Piedmont had the nucleus of a well-rounded organization that would permit earlier inauguration of service than would State's skeleton organization (R. 611, 612).

On petition for review of the Board's decision, the court below held by a divided vote* that the Board's award to Piedmont was legally defective in that (1) the Board had exceeded its jurisdiction by making the award to a party who was

*Judge Clark's opinion for the Court was concurred in by Judge Prettyman; Judge Edgerton dissented without opinion. (R. 677–686.)

not in fact "an applicant" for the route within the meaning of section 401 (d) (2) of the Act, and (2) there was no substantial evidence to support the Board's finding that Piedmont was "fit, willing, and able" to operate the route within the meaning of that section of the Act (R. 675–686). While reversing "the decisions of the Board insofar as they resulted in the granting of a certificate" to Piedmont, the court held that it lacked the power to order the Board to issue a certificate to State, and ordered that the case be remanded for further proceedings not inconsistent with its opinion (R. 686, 687).

SPECIFICATION OF ERRORS TO BE URGED IN NO. 157

The court of appeals erred:

(1) In holding that Piedmont was not an "applicant" for the route awarded to it within the meaning of section 401 (d) of the Civil Aeronautics Act;

(2) In holding that there was no substantial evidence to support the Board's finding that Piedmont was "fit, willing, and able" within the meaning of section 401 (d) of the Civil Aeronautics Act;

(3) In holding that as a matter of law an applicant cannot be found "fit" and "able" to operate an air route unless the applicant has come forward with plans showing how it proposes to operate over each portion of the route actually awarded;

(4) In undertaking to decide for itself what is technically necessary by way of plans and organization to render an applicant "fit" and "able" to operate the route awarded to Piedmont;

(5) In reversing the decision of the Board awarding the route to Piedmont.

SUMMARY OF ARGUMENT

I. In awarding air routes under Section 401 of the Civil Aeronautics Act the Board is not limited to the precise routes and points listed in the written application of the successful applicant. It has the duty of establishing routes required by public convenience and necessity and of choosing the most qualified applicants to operate those routes. The statutory provision that routes are to be awarded to "applicants" therefor does not mean that Congress intended to introduce precise technical pleading requirements into the administration of the Act. The scope of the routes applied for is not determined simply by a mechanical reading of the literal terms of the written application; it is relevant, also, to look to the position taken by the applicants before the Board and to other pertinent facts and circumstances relating to the proceeding. The crucial question in any case is whether, viewing the proceeding as a whole, the issues were defined and the interested parties afforded the opportunity to be heard on those issues. Applying this test, the Board was warranted in finding that Piedmont was an ap-

plicant for the route awarded. Although it submitted specific proposals, Piedmont, like other applicants, made itself a general applicant for such routes in the area under consideration as the Board might see fit to establish. State was well aware of this fact and had full opportunity to be heard both as to its own qualifications and as to those of Piedmont.

The selection of Piedmont was based upon substantial evidence. The record contains a convincing demonstration of Piedmont's fitness to operate the routes awarded on the basis of its financial, technological and personnel resources. The contrary conclusion of the court below is not based upon an evaluation of this evidence but on the unwarranted conclusion that Piedmont's proposed organization and operational plans were, in the opinion of the court below, inadequate to establish its fitness to operate on the routes established by the Board. It is the Board's function to weigh an applicant's qualifications in the light of the services required by public convenience and necessity. By substituting its independent judgment for that of the Board, the court below erroneously invaded a province exclusively entrusted by Congress to the licensing agency.

II. Even if the Board had erred in awarding the route to Piedmont, it could not now be directed to certificate State. The court below correctly held

that its power is limited to setting aside the certificate issued to Piedmont. It may not assume the Board's function of selecting the applicant deemed best qualified, and the route required by public convenience and necessity, in the light of all relevant factors at the time of determination. If the Board errs on matters of law, the sole function of the reviewing court is to lay bare such error, and to remand the cause to the Board so that it can perform its statutory functions in the light of the court's decision of the legal issues.

ARGUMENT

Introduction

Viewing the issues presented by this case in broad perspective, the Civil Aeronautics Board considers that the decision below has consequences which are destructive of the Board's ability to effectuate the policies of the Act and to conduct its proceedings in an orderly and expeditious fashion. The limitation imposed upon the Board by the lower court's ruling—that the Board must treat as ineligible for award of an air route all persons whose applications and proposed operating plans do not specifically cover every portion of the route found to be required in the public convenience and necessity—will seriously hamper the Board in the promotion and development of a sound air route pattern, particularly in the realm of local or feeder air routes. The inaugura-

tion of such service and its subsequent development are greatly dependent upon the qualifications of the applicant selected to operate the route. The free hand to choose the best qualified applicant which the Board should have is lost if the Board is unable to select such applicant solely because its written application did not specifically designate the route that the Board subsequently finds is needed in the public interest. Likewise, the Board may be unable to select any carrier to operate a route it finds required by public convenience and necessity if, as sometimes occurs, no applicant proposes a particular segment of such route or if two or more proposals are combined by the Board to form such a route. There is no basis for such limitation in the Act or its legislative history. It is not likely that Congress could have intended to confine the Board within such a procedural strait-jacket and to leave the achievement of its aims to depend upon the chance that some applicant, hopefully the best qualified applicant, would embody in its application the same appraisal of the public's need for transportation as that ultimately made by the Board. The decision below would mean, in effect, that the judgment as to which routes are required in the public interest would be made, not by the Board, but by the applicants.

Such a sacrifice of the Act's objectives could not be justified, even if, as the court below evi-

dently believed, private interests thereby received new and significant protection. But no new protection is afforded to private interests by the decision of the court below. The changes in the Board's procedure or in the pleadings of applicants which would be required by the decision below in order to permit the Board to select the most qualified applicant would not help private persons either to understand the issues better or to present their cases more intelligently. Moreover, the necessary changes would impede to a substantial degree the achievement of the substantive aims of the statute.

One method of meeting the court's stringent requirements might be for the Board first to determine what routes are required by public convenience and necessity and thereafter to afford applicants an opportunity to apply for such routes. Since all applicants would be aware of the precise routes chosen, they could all apply for such routes. The necessity of thus prolonging what are already lengthy, time-consuming procedures [10] would in itself substantially diminish the Board's ability to effectuate the purpose of the Act to establish an adequate air transportation system for the United States. And the duplication of proceedings and the

[10] Proceedings involving local feeder service have proved especially time consuming, since they involve service in wide areas, and frequently have required several years for completion even under existing procedures.

consequent delay would constitute a heavy and unjustified burden on the applicants as well as the Board.

The alternative solution is equally mischievous. If the present hearing procedure is retained, an applicant would, under the decision below, be forced to apply for all conceivable combinations and permutations of possible routes so as to blanket the field and assure that the routes ultimately selected by the Board would be within the scope of his application. Applications would then be hopelessly encumbered with largely worthless material and their usefulness in directing attention to the central issues in the proceeding would be destroyed.

Congress gave the Board broad discretion to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice" (Section 1001, 49 U. S. C. 641), and directed the Board to "dispose" of applications for certificates "as speedily as possible" (Section 401 (c), 49 U. S. C. 481 (c)). These specific provisions of the Act should not be thwarted by importing legalisms which are prejudicial to both public and private interests.

I

THE BOARD WAS AUTHORIZED TO AWARD THE ROUTE TO PIEDMONT

A. *In awarding air routes under section 401 of the Act the Board is not limited to the precise routes and points listed in the written application of the successful applicant.*

The court below erroneously held that an applicant for a certificate within the meaning of section 401 (d) of the Civil Aeronautics Act (hereinafter called "the Act") can be only a person, who, except for minor deviations, specifically requests the routes and points actually awarded. There is no basis for such a restrictive construction.

Section 401 (d) of the Act (Appendix A, *infra*, p. 62) provides that in instances of applications for certificates of public convenience and necessity, the Board upon making certain requisite findings "shall issue a certificate authorizing the whole or any part of the transportation covered by the application" in the case of application for a permanent certificate, and "may issue a certificate authorizing the whole or any part" of the transportation requested in an application for a temporary certificate.

It is settled law that administrative agencies in discharging their statutory duties and responsibilities are not resricted to those issues and requests specifically tendered by the moving papers in the

proceeding, but may in a proper case take such action as the inquiry reveals to be required in the public interest. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Cincinnati, Hamilton and Dayton Ry. Co.* v. *Interstate Commerce Commission*, 206 U. S. 142; *Alton & S. R. R.* v. *United States*, 49 F. 2d 414 (N. D. Calif.); *Chesapeake & Ohio Ry. Co.* v. *United States*, 11 F. Supp. 588 (S. D. W. Va.) *affirmed*, 296 U. S. 187; *St. Louis Southwestern Ry. Co.* v. *United States*, 234 Fed. 668 (W. D. Ky); *New York Cent. & H. R. R. Co.* v. *Interstate Commerce Commission*, 168 Fed. 131 (C. C. S. D. N. Y.). This principle has also been applied in those motor carrier cases in which the Interstate Commerce Commission has been upheld in its right to issue certificates of public convenience and necessity authorizing service to points not specifically requested by the applicant. *Chicago, St. Paul, Minneapolis and Omaha Railway Co.* v. *United States*, 322 U. S. 1; *Alton Railroad Co.* v. *United States*, 315 U. S. 15; *McCracken* v. *United States*, 47 F. Supp. 444 (D. Ore.). Similarly, it has been recognized that the Federal Communications Commission may grant radio licenses which authorize a signal of greater strength than that requested in the application or which require construction of a station differing from the one proposed by the applicant. *WREC* v. *Federal Radio Commission*, 67 F. 2d 578 (C. A. D. C.); *Woodmen of*

the World Life Ins. Soc. v. *Federal Communications Commission,* 105 F. 2d 75 (C. A. D. C.). *Cf. Plains Radio Broadcasting Co.* v. *Federal Communications Commission,* 175 F. 2d 359 (C. A. D. C.).

The foregoing are typical of the numerous cases which recognize that in situations in which public convenience and necessity or the public interest is the touchstone for the exercise of agency authority—as was true in the Board's proceeding here under review—administrative agencies are not restricted to the scope of the inquiry as determined by the private parties to the proceeding. On the contrary, it has been held that in such cases the regulatory agency has power itself to "control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services." *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 142, 143.

In the exercise of its powers and duties the Board is required by the Act (Section 2 (a), 49 U. S. C. 402 (a)) to consider, as being in the public interest and in accordance with the public convenience and necessity, the "encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the

United States, of the Postal Service, and of the national defense." In furtherance of its statutory responsibilities, the Board has taken the position that:

> In the very nature of an area proceeding of this type, the obligation placed on us by the Civil Aeronautics Act to develop a domestic air transportation system properly adapted to the needs of the commerce of the United States and the postal service requires that we consider the applications consolidated herein not with a view as to how an individual proposal would benefit such applicant or as to whether a particular proposed route is required precisely as set forth in the application, but rather with the objective of establishing a sound over-all air transportation pattern in the area involved.[11]

In the present case, the Board stated with respect to this problem:

> In passing upon applications for authority to engage in air transportation the Board must determine what route pattern will best meet the needs of the public convenience and necessity, and having done so

[11] *New England Case*, 7 C. A. B. 27, 31. The Board also has considered its authority to deviate from specific requests in other opinions. See *West Coast Case*, 6 C. A. B. 961, 979–980; *Southeastern States Case*, App. 565 (887); *Great Lakes Area Case*, 8 C. A. B. 360, 391; *Middle Atlantic Area Case*, 9 C. A. B. 131, 164; *cf. North Atlantic Case*, 6 C. A. B. 319, 346.

must select to operate that route the applicant best qualified to perform the service. Frequently, the route found to be required differs in a marked degree from that proposed by an applicant, and the best qualified applicant is not always the one proposing the route most nearly approximating that which is established.

* * * It is doubtful whether under any other interpretation of the Boards powers it could have fulfilled its obligations under the Act. This is particularly true in cases involving foreign air transportation, where international considerations play an important part, and in *area type proceedings for the establishment of local feeder service.* A construction of the Board's power in a manner that would limit its choice of a route to that proposed by some single applicant, and its choice of a carrier to that applicant outlining the route most nearly conforming with that found to be required by the Board would be an invitation to frustrate the carrying out of the very purposes which the Act seeks to accomplish. [R. 616, 617; italics added.]

In discharging its duties under the Act, the Board on numerous occasions has granted certificates authorizing service to points and along routes not specifically requested in an application in reliance upon general prayers contained in an application and other indications that the carriers in the proceeding considered themselves to

be applicants for that route pattern found to be required in the public interest.[12] While it is not contended that the Board is the final judge of its own powers, it is submitted that in a situation such as is here presented, where the statutory authority of the Board to issue certificates must be construed in the light of the highly specialized field in which it works and its responsibilities and duties under the Act, the reasonable interpretation by the Board that it is not restricted in a proper case to the issuance of certificates authorizing service only to those points and along

[12] In the various "area cases" decided by the Board other than the *Southeastern States Case*, a comparison of the applications of the successful applicants with the routes awarded will reveal that in most instances the route awarded differed from that proposed by the application, and in many instances included authorization to serve points not specifically requested. *Rocky Mountain States Air Service*, 6 C. A. B. 695; *The Florida Case*, 6 C. A. B. 765; *The West Coast Case*, 6 C. A. B. 961; *The New England Case*, 7 C. A. B. 27; *The Texas-Oklahoma Case*, 7 C. A. B. 481; *The North Central Case*, 7 C. A. B. 639; *The Great Lakes Area Case*, 8 C. A. B. 360; *The Middle Atlantic Case*, 9 C. A. B. 131; *The Arizona-New Mexico Case*, 9 C. A. B. 85; *The Mississippi Valley Case*, 8 C. A. B. 726. For examples of similar awards in other than area cases see *Mid-Cont. Air., Twin Cities-St. Louis Operation*, 2 C. A. B. 63 (Authority granted to serve Rochester, Minnesota, although not requested by the successful applicant); *National Air et al., New Orleans-Ft. Worth Service*, 4 C. A. B. 278 (Eastern Air Lines authorized to serve Lake Charles, La., upon the basis of a general prayer contained in its application). The same procedure has been followed in cases involving applications for certificates to engage in foreign air transportation. *North Atlantic Case*, 6 C. A. B. 319.

routes specifically requested in an application, should be of controlling effect. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130, 131; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 153, 154. *Cf. Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

The court below recognized and gave effect to the foregoing principles and authorities to the extent of stating that "slight deviations" from the routes actually proposed by the successful applicant were permissible in awarding a certificate (R. 681). It thus in effect conceded that an application conforming exactly to the route awarded is not a jurisdictional prerequisite to issuance of a certificate. The court failed, however, to indicate any standards by which the latitude allowable to the Board is to be judged. We think it clear that permissible deviation must be judged in terms of the existence of adequate notice to other parties that the successful applicant was in fact an applicant for the routes awarded and opportunity for other parties to be heard thereon. Compare *National Labor Relations Board* v. *Mackay Radio & Telegraph Co., supra; National Labor Relations Board* v. *Piqua Munising W. Prod. Co.*, 109 F. 2d 552 (C. A. 6); *New York Cent. & H. R. R. Co.* v. *Interstate Commerce Commission, supra; Alton & S. R. R.* v. *United States, supra.* In other words, as the Board has fully recognized, its power must be

exercised in such manner that interested parties are not deprived thereby of procedural or substantive rights. See, *e. g., North Central Case,* 7 C. A. B. 639, 674; *Atlantic Seaboard Operations,* 4 C. A. B. 552, 558, 559. The determination of these issues is a factual one which the Board must make in the first instance from all of the facts and circumstances of a particular proceeding, and is not to be determined solely from the face of an application, as the court below erroneously assumed. Just as the question of whether applications should be heard separately or together is primarily one for the Board,[11] so also is the question of whether the applicants in a consolidated proceeding are in fact competing for that route pattern which the Board shall determine to be required by the public convenience and necessity. In the present case the Board took pains to assure State, and all other applicants, a fair hearing, and, as will be demonstrated below, there was ample notice and opportunity to present evidence.

B. *Piedmont was an applicant for the route awarded*

The Board specifically found that Piedmont's application was sufficiently broad to embrace the

[11] Section 1001 of the Act (49 U. S. C. 641) provides in pertinent part:

"The [Board] may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

routes awarded.[14] Second Supplemental Opinion of December 12, 1947 (R. 615). The court below, however, ruled that the "implied finding by the Board that Piedmont was an applicant for the routes awarded lacks the support of any evidence, substantial or otherwise" (R. 681). In so holding, the court completely ignored the evidence of record upon which the Board relied to support its finding. As is apparent from its opinion, the conclusion reached by the court stems entirely from its interpretation of section 401(d) and the dictionary meaning of the word "modification" employed in Piedmont's application. The court

[14] (1) Between the alternate terminal points Cincinnati, Ohio, and Louisville, Ky., the intermediate points Lexington, Ky., London-Corbin, Ky., Middlesboro-Harlan, Ky., and Bristol, Va., and (a) beyond Bristol, Va., the intermediate points Asheville, N. C., Charlotte, N. C., Southern Pines-Pinehurst-Aberdeen, N. C., and Fayetteville, N. C., and the terminal point Wilmington, N. C., and (b) beyond Bristol, Va., the intermediate points Winston-Salem, N. C., Greensboro-High Point, N. C., Raleigh-Durham, N. C., Goldsboro, N. C., and New Bern, N. C., and from May 1 to October 31, inclusive, of each year, the terminal point Morehead City, N. C.;

(2) Between the terminal point Cincinnati, Ohio, the intermediate points Portsmouth, Ohio, Ashland, Ky.-Huntington, W. Va., Charleston, W. Va., Beckley, W. Va., Princeton-Bluefield, W. Va., Roanoke, Va., Lynchburg, Va., Charlottesville, Va., and Richmond, Va., and the terminal point Norfolk;

(3) Between the terminal point Roanoke, Va., the intermediate points Danville, Va., Greensboro-High Point, N. C., Raleigh-Durham, N. C., and Fayetteville, N. C., and the terminal point Wilmington, N. C.

stated, however, that its function was not to find facts and that the question of whether Piedmont was an applicant was essentially a determination for the Board. As we shall demonstrate, the Board's finding that Petitioner was in fact an applicant for the route awarded finds abundant support in the record.

Piedmont's original application stated that it sought authority to engage in scheduled air transportation over certain proposed routes "or such modification of such routes as the Board may find public convenience and necessity require" (R. 31). In the general prayer to its application Piedmont also sought "such other and further relief, general and specific, under Section 401 of the Civil Aeronautics Act of 1938, as amended, as the Board may deem appropriate, and to which the applicant may be entitled in any proceeding in which the applicant may be heard in part or in its entirety" (R. 41). Piedmont's application proposed scheduled air transportation of persons, property, and mail in a combination passenger-property pick-up service over routes extending through North Carolina, Ohio, Virginia, West Virginia, Kentucky, Tennessee, Georgia, South Carolina, and the District of Columbia (R. 31–41).

Thereafter Piedmont filed an amended application which eliminated the specific proposal to carry passengers in the pick-up service and the

proposed services in Ohio and Kentucky (R. 62–70). However, in such amended application, Piedmont again sought specific routes "or such modification of such routes as the Board may find the public convenience and necessity require." With respect to such application the Board found:

> As amended, the application sought a total of 5,763 miles of route specifically described, consisting of five routes for conventional passenger, property, and mail service, totaling 1,404 miles, and fifteen property-mail pick-up routes comprising the remaining mileage. These proposals outlined a comprehensive system of air transportation including the states of Virginia and North Carolina, which are to be served by the route system found to be required. The route awarded Piedmont totaled approximately 1,700 miles.
>
> Piedmont's application, *when viewed in the light of all pertinent factors,* shows that that carrier was, within the meaning of section 401 (d), an applicant for the routes awarded it. It specifically proposed certain routes and types of service. Clearly these represented the proposals that it felt would best meet the public need for service in the area. It recognized, however, that the Board might reach a different conclusion, and drafted its application to indicate its desire to be considered as requesting and as willing to operate those routes which the Board determined were

> needed. Such a practice has become customary in *local feeder service applications* and is attributable in large part to the number and diversity of the factors which must be weighed, both by the various applicants in preparing their applications and by the Board in reaching its decision. [R. 616; italics added.]

At both the hearing and the argument before the Board, Piedmont indicated that its written application was to be construed broadly. The president of Piedmont testified that his company stood willing to serve any point not included in its application which was along its proposed routes (R. 470). Similarly, counsel for Piedmont, in discussing its proposed routes, indicated its unqualified willingness to extend its Norfolk-Roanoke route proposal into the mountains to Charleston, West Virginia, if the Board should think well of it (R. 554). This offer plainly demonstrates the fluidity of Piedmont's proposal and the lack of significance to be attributed to the existence of mountainous terrain in determining the scope of its proposals. Moreover, since the Board had indicated in another proceeding that it viewed service to Charleston with favor,[15] Piedmont's offer clearly disclosed that

[15] In the *Great Lakes-Florida Case*, 6 C. A. B. 429, 452, the Board in deferring certain applications for decision with the applications in the *Southeastern States Case*, stated: "* * * the major justification for the establishment at this time of a Chicago-Norfolk route would appear to be for the purpose

it was willing to render those services which the Board might find to be required.

C. *The procedure followed by the Board did not deprive State of any procedural or substantive right*

State contended below that the Board's action in issuing the certificate to Piedmont deprived it of that procedural due process to which it is entitled under the Civil Aeronautics Act, the Administrative Procedure Act,[16] and applicable general principles of law, in that it had no notice that the Board considered Piedmont to be an applicant for the routes awarded and accordingly failed to cross-examine Piedmont's witnesses fully and otherwise to rebut Piedmont's case. This contention is entirely lacking in substance. All the parties to the proceeding knew, or should have known, that in an area proceeding the Board first determines the routes required in the public interest and thereafter selects the applicant found to be best qualified to perform the required service. The Board made this clear

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of providing a local service between Charleston and Roanoke, and between Richmond, Lynchburg, and Norfolk."

[16] State relied particularly upon the provisions of section 5 (a) of the Administrative Procedure Act (60 Stat. 237, 239, 5 U. S. C. 1004 (a)). While the point is academic, it may be noted that section 5 (a) did not become effective until September 10, 1946, which date was subsequent to the hearing in the proceeding under review here. Obviously, the Administrative Procedure Act is inapplicable to the case at hand.

in its *Investigation of Local, Feeder, and Pick-up Air Service,* 6 C. A. B. 1 (1944). It there rejected a proposal to limit extensions of service by existing "trunk line" carriers to cities of 25,000 or more as a protection to "feeder" carriers because "the Board has * * * adopted the general practice of hearing in a consolidated proceeding all applications proposing service in the same general area * * * [which] affords full opportunity to consider the character of services proposed by the various applicants and the relationship of the type of each service to the air transportation needs of the individual cities or towns" (6 C. A. B. at p. 2). See also *Annual Report Of The Civil Aeronauties Board,* 1943, pp. 9–10. Thus, it is manifest that in the investigations which preceded the issuance of various "feeder" authorizations in individual area cases, the Board clearly indicated that the needs of an entire area for air transportation would be considered, and that the primary consideration in issuing certificates would be the need shown for a particular type of service to a particular point rather than a specific proposal advanced by an individual applicant.

The fact that State and the other applicants in the proceeding here under review were aware of the nature of area proceedings before the Board and of the fact that the Board would select the applicant deemed best qualified to perform the services found to be required is clearly dem-

onstrated by the record of the Board's proceeding. In each of its applications in the instant proceeding, State included a "catch-all clause" indicating that it desired to be considered as an applicant for that route which the Board found to be required in the public convenience and necessity (R. 7, 13–14, 23–24). Most of the other applications consolidated into the proceeding, including that of Piedmont, contained clauses designed to inform the Board of the desire of the particular applicant for whatever route pattern the Board might find necessary to meet the needs of the area for additional air transportation services. Such clauses ranged from prayers requesting general relief, pursuant to section 401 of the Act, to requests that the particular applicant be considered as an applicant for any point or points included in any application or applications which might be consolidated with its application for hearing or decision."[17] Further, for the benefit of those parties who might not have been familiar with the Board's practice, the Examiners, in their Prehearing Conference Report, specifically referred to the purpose and desirability of including a "catch-all clause" in an application (R. 671).

During the course of the hearing various witnesses testified that their companies would be

[17] Specimen "catch-all clauses" are set forth at pages 665 to 670 of the record, and are illustrative of the types of clauses contained in various applications.

willing to serve other points or areas which the Board might designate, in addition to those specifically mentioned in their applications (R. 673). The testimony of other witnesses indicates that it was expected that the Board in awarding certificates would place reliance upon "catch-all clauses" contained in applications (R. 671, 672).

After the conclusion of the hearing and at the time State submitted its brief to the Examiners, it obviously considered that it was competing on an equal basis with the other new applicants in the proceeding for whatever "feeder route" the Board might award. In its brief to the Examiners (R. 475–483) State undertook to establish that its "position before the Board is superior to that of any other new applicant seeking to serve this area." In so undertaking, State directed "attention to the seven new applicants whose applications, because of routes, proposed operations or ability, bear the closest resemblance to those of State." One of these new applicants was Piedmont. Five pages of the brief are then devoted to a comparison of State with the mentioned seven new applicants in the proceedings. Only in the case of two such new applicants did State even mention the specific routes which the particular applicants proposed, but on the contrary stressed its contention that it had demonstrated ability to conduct air transportation operations superior to those of any of the other new applicants. There is no question but that

State knew that the successful feeder applicant in this area would be selected upon the basis of operating ability rather than upon specific route proposals, and that, to be successful in the proceeding, it would have to demonstrate its superiority on such basis.

In its exceptions to the Examiners' report, State contended for an application to it of that very principle which it now asserts to have been beyond the Board's power, stating that the Examiners "erred in granting to other applicants and failing to grant to State certain authority, which, although not specifically sought by State, would, if granted to State rather than to other applicants, form a more logical part of the operating authority recommended by the Examiners for State" (R. 529).

Thereafter, when the case was argued before the Board, it again appears that the parties understood perfectly the nature of the Board's proceeding. As stated by counsel for one of the "new applicants" (R. 674):

> The real issues in the feeder phase of this case are two: First, does the public convenience and necessity require any local or feeder air service in this area, and if it does, which of the applicants presently before the Board is best qualified and able to develop the necessary service.

On at least three occasions counsel for feeder applicants other than Piedmont or State were

asked by Board members whether they would be willing to serve other points than those for which specific applications had been made, and in each instance the reply was in the affirmative (R. 674). The following colloquy between a Board member and counsel for State also is significant (R. 551):

> Mr. BRANCH. Mr. Hill, I am just wondering whether this map is intended to indicate all of the points which you propose to serve on these various routes, and for instance, you have quite a number of cities, small cities, or larger cities, shown, usually pretty close to the route, but apparently [not] to be served by the route. I will tell you what bothers me. Taking the routes, and running through them it would seem that you simply hit the high spots, the live cities. I wondered if this was an accurate portrait of all of what you propose to serve.
>
> Mr. HILL. I meant to explain. Those that do not sit on the lines are points which are embraced in the scope of this proceeding, and which we could and would be willing to serve if the Board should choose to assign them to us. We have a catch-all clause in our application, and we are quite willing to serve those points if the Board should feel that the public interest required that service. The points that are actually on the routes are the ones which we definitely did propose to serve.

As has been noted (*supra*, p. 29), similar statements were made on behalf of Piedmont indicating its willingness to render services to points

and over routes not specifically mentioned in its application.

It thus appears that the various applicants before the Board were all willing to render whatever service the Board should find required in the public interest, and that the applicants for feeder and local services realized that they were competing applicants for whatever certificate or certificates might be issued. The specific proposals submitted by such applicants represented the applicant's view of the services required for the area, but recognized that the Board might determine that a different pattern of service was necessary. In accordance with the customary practice in area cases, with which practice the applicants were familiar or had been informed, the various applications were so drafted as to permit the Board to select that applicant which it considered best able to perform the services found to be required.

Full opportunity was afforded State to introduce any relevant evidence which it desired to adduce in support of its own application or in opposition to other applications, and it was granted every opportunity to cross-examine other applicants. In argument to the Board on reconsideration, State's attorney stated that "as a matter of fact, we never took Piedmont seriously" (R. 605). The fact that State did not anticipate that Piedmont would be the successful applicant

or that the Board's decision came as a surprise to State did not deprive it of due process. *Market St. Ry. Co.* v. *Railroad Commission of State of California,* 324 U. S. 548, 558; *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 527. To establish its claim of lack of due process, State must show more than that it was under a misapprehension as to the steps which were necessary best to present its case to the Board, if in fact State was under any such misapprehension. *Market St. Ry. Co.* v. *R. R. Comm. of State of California, supra,* at page 559.

Even if it be assumed, *arguendo,* that State was *not* on notice that Piedmont was an applicant for the certificate issued, State was nevertheless required as a prerequisite to judicial review to avail itself of the opportunity to present specific objections to the Board showing wherein it was prejudiced by the Board's proceeding. *Cf. Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 804. While the courts endeavor to protect the rights of parties to a fair hearing, it will not be presumed that such rights have been substantially denied when parties do not embrace the opportunity to prove their grievances in the proper forum. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.* v. *United States,* 322 U. S. 1, 3.

An examination of the petition for reconsideration (R. 566) filed by State after the Board's

decision of April 4, 1947, discloses that although State contended that it was deprived of notice and hearing by the Board's action in certificating Piedmont (R. 566 (10) (13)), most of the petition was directed to arguments concerning the legal power of the Board to certificate Piedmont and comparisons between Piedmont and State. While various findings of the Board were challenged as lacking support in the record, State did not request rehearing unless "deemed necessary" (R. 566 (1)) and offered only to prove on rehearing "if necessary" that it "could set up airline operations" faster than Piedmont (R. 566 (42) (54)).

During the course of the argument before the Board on reconsideration, State's attorney was questioned closely by various members of the Board as to whether the presentation of its case would have been any different if Piedmont had applied specifically for the entire routes awarded (R. 604, 605, 606). Counsel asserted generally that in such a case he believed it would have affected the nature of cross-examination and rebuttal, but failed to specify in what way it would have been affected.

After the conclusion of argument by State's attorney, Public Counsel directed attention to the fact that State had not "indicated just what it would have done if it had a further hearing, or just what evidence it would have been able to adduce on direct or cross-examination that would

improve its position" (R. 608). Thereafter, on rebuttal, State's attorney stated that although the record indicated that Piedmont had facilities for overhaul of all types of aircraft, "actually it is not so, and had State known that Piedmont was an applicant for these routes, State could have proved it" (R. 608).

It thus appears that, at most, State desired a rehearing for the purposes of introducing evidence showing that Piedmont did not have the overhaul facilities which it claimed to have, and in support of State's contention that it could inaugurate service more rapidly than Piedmont. With respect to the first point, the Board did not find that Piedmont possessed overhaul facilities for all types of aircraft, but rather merely noted the historical fact that Piedmont had demonstrated its ability to maintain and overhaul all types of aircraft under wartime Army contracts (R. 611). State did not propose to refute the finding the Board actually made, which was not, in any event, critical to its ultimate conclusion. Moreover, State was in no position to challenge the Board's findings as to Piedmont's fitness since State's attorney conceded that "both State and Piedmont are fit and able, it's a question of which has demonstrated in this record to be more fit, willing and able" (R. 607).

With respect to the second point, State adduced evidence as to when it could inaugurate services at the hearing, and took the position that

at least one year should be allowed in which to begin operations (R. 87, 90). It did not offer to prove on rehearing any facts which might affect the Board's judgment. It is not surprising, therefore, that the Board concluded that Piedmont could inaugurate services more rapidly than State, a judgment confirmed by the commencement of operations by Piedmont three months after the issuance of the certificate. Rehearing as to these matters plainly was not required and would have served no useful purpose. The determination that Piedmont could inaugurate services more rapidly than State was a judgment based upon all the evidence of record concerning the carriers, and certainly the Board was not required to reopen the record upon State's unsupported assertion that the Board erred in its conclusion drawn from undisputed facts of record. Further, the selection of Piedmont over State was based on all of the evidence relating to the superior organization and operating experience and ability of Piedmont, and did not rest solely upon the ground that Piedmont could inaugurate services in less time than State. Clearly, the Board did not abuse its discretion in refusing to reopen the record upon the basis of State's general assertions. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514–519; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 534–535.

State's objections with respect to notice and hearing amounted merely to the formal conten-

tion that State was deprived of notice and hearing.[18] Due process, however, deals with matters of substance, and its lack is not established by mere formal objections that have no substantial bearing on the rights of parties. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351; *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265, 277–278; *Market St. Ry Co.* v. *R. R. Comm. of State of California, supra,* at page 562. If State had been prejudicially affected by the course of the Board's proceeding, it was incumbent upon it to come forward with a specific request for rehearing, based upon appropriate contentions of actual prejudice. Not having done so, it cannot now be heard to contend that it was deprived of notice and hearing. *Cf. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* v. *United States, supra.*

Contrary to State's assertion that the Act confers an absolute right to a certificate upon any carrier once found to be fit, willing, and able to perform proposed services required by the public convenience and necessity (see Point II,

[18] As heretofore shown, State's position before the Examiners was that it had demonstrated ability superior to that of Piedmont without reference to the specific proposals of Piedmont. This fact, coupled with the obvious fact that the specific routes requested by Piedmont paralleled a substantial portion of those requested by State, reveals the real reason why no showing of actual prejudice was made—State had presented its entire case and had nothing further to offer.

infra, p. 52), the only right granted to an applicant for a certificate is the right to a fair hearing upon its applications and a determination thereon based upon facts fairly found. State was afforded a fair hearing and, as we shall show, the selection of Piedmont over State was based upon adequate findings supported by substantial evidence. The contention that the Board was precluded from awarding the route to Piedmont, because an applicant must specifically request the precise route established by the Board, might equally have been made by Piedmont had the Board selected State. (See, *infra,* pp. 53–54.) This only serves to reinforce the view that State is now insisting on an empty procedural formality which should not be imposed as a limitation upon the Board in effectuating its responsibilities under the Act. Here, as in *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 501, it is appropriate to "remember that the machinery of government would not work if it were not allowed a little play in its joints."

D. *The grant of the certificate of public convenience and necessity to Piedmont was based upon adequate findings supported by substantial evidence*

The court below upset the Board's finding of fitness, willingness and ability of Piedmont on the asserted ground that substantial evidence was lacking to support the finding. The essential

basis for the invalidation of this determination, however, is to be found in the court's erroneous interpretation of the terms "fitness" and "ability". The majority held in effect that under the Act an applicant cannot be found "fit" and "able" unless the applicant has come forward with plans showing how it actually proposes to operate over each portion of the routes awarded. In reaching this conclusion, the court relied upon a former decision in which it set forth the tests of fitness and ability established by the Board. *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 147 F. 2d 152, 153 (C. A. D. C.). The court erred, however, in supposing that the requirement of a plan for the conduct of service made by competent personnel meant that an applicant must show specific plans for operation over each portion of the routes awarded. The *Braniff* case did not so hold, nor has the Board ever held that an applicant must show such a plan of operations before it can be found fit, willing and able. Furthermore, by its uniform and consistent practice in awarding routes differing from specific proposals, the Board in substance has held that no such showing must in fact be made. Since a determination of the elements which must be shown to establish fitness and ability is one calling for expert judgment in aviation matters, the court below erred in substituting its views for those of the Board.

No consideration was given in the opinion below to the detailed findings of fact upon which the Board relied to support its ultimate finding of fitness and ability. On the contrary, the court contented itself with holding that Piedmont's demonstration of its ability to operate an extensive air transportation system "along basically north-south-routes, paralleling existent surface travel, and avoiding mountainous terrain", could not as a matter of law serve to support a finding of fitness and ability to operate "on basically east-west routes, generally at right angles to the major lines of flow of existing surface travel, and crossing large areas of a very mountainous region" (R. 685). The court stated this proposition as if it were so axiomatic and self-evident that "no reasonable mind" could disagree. In so holding, the court completely overlooked the fact that Piedmont had demonstrated its ability to operate over large areas of a very mountainous region, both in its proposed passenger operations and its pick-up services. (See Map, Appendix B, *infra*, p. 64.) Even disregarding pick-up operations, Piedmont proposed to serve Knoxville (R. 69) and Charleston, W. Va. (R. 554) both of which involved flying over mountainous terrain, as the topographical map in the opinion below discloses.

Actually the court below undertook to make technical judgments respecting fitness and ability which Congress has clearly entrusted to the

Board. The impact of mountainous terrain, or of the direction of air routes or surface travel, upon the capability of an applicant to operate an air route, is a matter for the Board to determine, and not the courts. Further, the fact that mountainous territory does not present the insurmountable barrier to an airplane that it presents to surface transport is so apparent as to negative any factual support for the view of the court below. The objections advanced by the court to the Board's findings relating to Piedmont's fitness and ability reflect judgments on technical questions which can hardly support the court's legal conclusion that the Board cannot certificate a carrier for routes and points other than those specifically enumerated in an application. If, as the court below thought, evidence of ability to operate a substantial air transportation system can never constitute substantial evidence of ability to operate a route differing from that specifically proposed, then the Board's findings concededly lacked support in the record. If, on the other hand, the realities of air transportation are to be considered in determining fitness and ability, no question can exist as to the legal sufficiency of the Board's findings.[19]

[19] It is doubtful that State was entitled to urge its objections to the Board's findings relating to Piedmont's fitness and ability to the court below or that the court had jurisdiction to consider these objections. At the completion of State's argument in chief upon reconsideration before the Board, in response to a question by Chairman Landis as to

The Board made the ultimate statutory finding that Piedmont was fit, willing and able (R. 565 (907), 619). This finding in turn was supported by the required basic findings relating to a proper organizational basis for the conduct of air transportation, a plan for the conduct of service made by competent personnel, and adequate financial resources. *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 147 F. 2d 152, 153 (C. A. D. C.).

The Board's finding of adequate financial ability (R. 565 (901, 902), 611, 612) was based upon an estimate that a total of $1,100,000 would be required by Piedmont to finance its proposed operations, including passenger operations, and the presentation in evidence of an adequate program whereby such an amount could be secured

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whether it was taking the position that Piedmont was not capable of operating the routes awarded, State's attorney replied (R. 607):

"We are taking the position that both State and Piedmont are fit and able, it's a question of which has demonstrated in this record to be more fit, willing and able."

Under general principles of law governing appeals from administrative orders and the specific provisions of the Civil Aeronautics Act requiring that objections must have been urged to the Board before such objections may be considered on review, State, in thus withdrawing its objections to the Board's findings respecting Piedmont well may have been precluded from urging such objections to the court. *United States* v. *Hancock Truck Lines*, 324 U. S. 774; *cf. Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635. No finding on this point was made by the court below, notwithstanding the fact that it was urged to the court.

(R. 291, 446, 451–459).[20] Similarly, the Board's findings relating to the organizational basis of Piedmont, clearly are supported by substantial evidence (R. 283–290, 436–442, 447). Indeed, the superiority of Piedmont's organization over that of States' was one of the principal reasons for designating Piedmont to operate those routes found to be required (R. 565 (902), 611, 612). The necessary organizational basis of a carrier relates only to the nucleus of the organization. *Delta Air et al., Service to Atlanta and Birmingham,* 2 C. A. B. 447, 488. Employees for various required stations and other personnel are of course not obtained until after the certificate has been issued; otherwise applicants would be unable to finance themselves during the necessarily protracted proceedings for a certificate.

The Board also found that Piedmont had outlined a "comprehensive system of air transportation" (R. 616) and possessed the "requisite ability to conduct successfully the authorized service" (R. 614). There can be no question but that the Board was justified upon the basis of the record in thus determining that Piedmont possessed the necessary "know how" to conduct scheduled operations and had presented a competent plan of operations for the specific pro-

[20] Petitioner demonstrated to the Board its ability to finance a route system of over 5,000 miles, 1,400 of which were for conventional passenger, property and mail service.

posals advanced (R. 436–442, 447, Piedmont's Exhibits, R. 283–415).

It is submitted that the plan of operations presented by Piedmont demonstrated its ability to conduct scheduled operations, fully supported the Board's findings that Piedmont was fit and able to operate the routes for which it was certificated. Although the court below held in substance that a proper plan of operations must specify schedules and equipment to be used over those routes actually awarded, the Board could not as a matter of law restrict a carrier, once certificated, to those precise details of its operations proposed in the hearing upon its application.[21] Under such circumstances, the plan of operations submitted upon an application can be used only as an indication of the carrier's ability successfully to perform scheduled air transportation services. Piedmont's demonstrated ability to operate a route system of over 1,400 passenger miles and an additional 4,400 miles of pickup service certainly justified the finding by the expert aviation agency that Piedmont was fit and able to operate the 1,700 mile system awarded.[22]

[21] Section 401 (f) of the Act (49 U. S. C. 481 (f)) provides in part that "no term, condition, or limitation of a certificate shall restrict the rights of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation * * *."

[22] Although obviously not of record in the case, the fact that Piedmont started operations with commendable promptness and has successfully continued them since demonstrates the practical correctness of the Board's findings and approach to the problem of fitness and ability.

Particular emphasis was placed by State below upon the fact that Piedmont proposed to use single engine aircraft in its operations and the court also commented on this fact. An examination of the record will disclose that many applicants proposed to utilize aircraft not then approved for commercial operations, some of which were in an experimental stage. These proposals were advanced because of the generally prevailing view that existing type aircraft were not suitable for feeder line operations, both from the standpoint of operating efficiency and the fact that airports serving smaller communities could not accommodate large aircraft.[23] Piedmont's president expressed this view in explaining its proposed use of single engine aircraft, and indicated that it preferred twin-engine aircraft (R. 442). Further, the Board could not require that a carrier utilize that type of aircraft proposed in its application, and the Board assumed, as usual (*American Export Air, Trans-Atlantic Service,* 2 C. A. B. 16, 38), that any carrier awarded a route would choose the best and most suitable type of equipment available at the time operations were begun (R. 614).[24]

[23] State proposed to serve those cities having airports unable to accommodate DC–3 aircraft with either Douglas Sky bus or Lockheed Saturn aircraft, neither of which were or are in commercial use (R. 233).

[24] State also contended below that the Board should have made a finding concerning whether the use of single engine aircraft met the safety requirements of the Board. State's

With respect to the selection of the carrier to operate the required routes, State's real contention, as pointed out by the Board, is that had more weight been ascribed to certain factors most favorable to it, a different result would have been reached (R. 612). However, as also stated in the Board's opinion, the various relevant factors employed in selecting one carrier from among competing carriers cannot be given a fixed value to be applied without change in every proceeding, nor can they be weighed in the manner of goods placed upon a set of scales (R. 612, 613).[25] Like the process of rate-making, the administra-

own attorney advised the Board that he realized that the Board did not require proof in certificate cases relating to safety considerations (R. 603). The Board pointed out in its second supplemental opinion that such matters were considered in connection with the application for an air carrier operating certificate required to conduct operations authorized by a certificate of public convenience and necessity (R. 614). Further, the legislative history of the Act establishes conclusively that "safety" is not an "element of certificates of convenience and necessity, but only of air carrier operating certificates". Conference Report to Accompany S. 3845, Report No. 2635, House of Representatives 75th Cong., 3rd Sess., p. 68.

[25] The Court is concerned only with the question of whether the Board's action is supported by the record in this case, and not with alleged inconsistencies with findings made in other proceedings and action taken in other cases. *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 665; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 774, 775; *Brotherhood of Locomotive Firemen and Enginemen* v. *Kenan*, 87 F. 2d 651 (C. A. 5); *Bondu-*

tion of national air transportation policy requires consideration of "factors that must be valued as well as weighed." *Board of Trade* v. *United States,* 314 U. S. 534, 546.

The basis of the Board's selection of Piedmont over State is clearly and succinctly stated to be that (R. 611):

> * * * the choice stemmed from the conclusion that Piedmont had demonstrated superior operational experience acquired in the successful conduct of diversified activities and possessed physical facilities and a well-rounded organization with key personnel familiar with operating conditions in the area involved that would be available for the certificated operations.

For the reasons stated, the undisputed facts concerning the two carriers and recited in the Board's opinions (R. 565 (901–902), 611, 612) amply justified the selection of Piedmont over State, and there was nothing arbitrary, capricious, or fanciful in the Board's choice. The court

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rant v. *United States*, 50 F. Supp. 704 (M. D. N. C.); *Lang Transp. Corp.* v. *United States*, 75 F. Supp. 915, 925 (S. D. Cal.). Similarly, if the Board's findings are supported by the record, the fact that the recommendations of Public Counsel and the examiners were not followed is of no significance. *National Labor Relations Board* v. *Laister-Kaufmann Aircraft Corporation*, 144 F. 2d 9 (C. A. 8), *National Labor Relations Board* v. *Botany Worsted Mills*, 135 F. 2d 876 (C. A. 3), certiorari denied, 319 U. S. 751.

below erred in ruling that because Piedmont did not submit a plan of operations for the specific routes awarded, the selection of Piedmont was arbitrary and capricious, and that ruling should be reversed.

II.

THE COURT BELOW PROPERLY HELD THAT IT LACKED POWER TO DIRECT THE BOARD TO CERTIFICATE STATE

State unsuccessfully sought in the court below, and by its cross-petition for certiorari seeks here, a determination that it is entitled to a judicial order requiring the Board to award to it the route the Board awarded to Piedmont. It is evident that this question becomes material here only in the event that it is concluded, contrary to our contention, that the Board erred in certificating Piedmont. Accordingly, for the purposes of the following discussion it will be assumed, *arguendo,* that the decision of the majority of the court below in setting aside the Piedmont award was proper.

It is elementary that no court may grant an authorization which a regulatory agency has refused. *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 14; *cf. Federal Power Commission* v. *Pacific Power and Light Company,* 307 U. S. 156; *United States* v. *Jones,* 336 U. S. 641. Equally well settled is the

principle that the courts are not at liberty to prescribe the attitude that such an agency must adopt toward the exercise of the discretion left to it rather than to the courts. *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U. S. 671, 691.

State contends that no element of discretion is left to the Board in this case. On the contrary, State asserts that the issuance of the certificate to it would constitute merely a ministerial act since the Board already has found public convenience and necessity for the routes in question and has further found State to be fit, willing and able. The disqualification of Piedmont by the court below, if that disqualification is sustained, would, under State's theory, leave State as the only qualified candidate for the certificate and absolutely entitled thereto as a matter of law. Apart from the fact that State, although once found by the Board to be fit and able, may no longer be so, State is not, on its present applications, qualified under its own theory for issuance of the certificate in question.

The routes established by the Board did not follow in all respects the specific routes and plan of operations proposed by State. Moreover, these routes included points for which authority had not been specifically requested by State. Accord-

ingly, State's contention that it was entitled as a matter of right under the Act to the certificate which the Board awarded to Piedmont necessarily must rest upon the application to itself of the very principle to which it objects when applied to Piedmont. Further, State was not the only qualified applicant for the routes awarded to Piedmont. The Cincinnati-Norfolk route was requested by three certificated carriers, Eastern Air Lines, Delta Air Lines, and Pennsylvania Central Airlines (R. 565 (866, 867, 896)). The Board found that such route was required and could not have found that these carriers were other than fit. Moreover, an examination of the proposals of Delta Air Lines (R. 659) and Eastern Air Lines (R. 663), will disclose that the specific routes requested by these carriers, together with the routes for which they already held certificates, closely approximated the routes awarded to Piedmont.[26] If State's position were sound, then any or all of these carriers, in addition to State, could contend that some or all of the routes awarded to

[26] State's contention that it alone established the need for those services for which Piedmont was certificated is without merit. An examination of the maps setting forth the proposals of the various applicants in the proceeding (R. 638–664) will disclose that, as the Board indicated in its second supplemental opinion (R. 618), virtually every proposal embraced in substance all or a part of the proposals of one or more applicants. As previously stated, all of the applicants offered evidence in support of their proposals. In addition, similar testimony was offered by the various intervening municipal organizations. (See Statement, *supra* at pp. 6–7.)

Piedmont should be awarded to them as a matter of statutory right, which would be absurd.

The fact that upon remand the certification of a new carrier or the determination of whether any carrier should be certificated for the routes in question rests within the Board's discretion, and that the Board is not bound by the findings already made with respect to State, is conclusively established by the decision of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134. In that case a determination of the Federal Communications Commission as to the financial qualifications of an applicant for a broadcasting license was reversed by the Court of Appeals. On remand it was proposed to reopen consideration of certain of the applicant's other qualifications. The Court of Appeals sought to prevent this action by the Commission by issuing a writ of mandamus. It was of the view that the Commission's previous findings, having been in effect approved by the court, could not be altered in the absence of exceptional circumstances, and then only by permission of the court. *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 105 F. 2d 36 (C. A. D. C.).[27]

[27] As the court conceived it, the question was "whether the Commission, having decided that the petitioner was qualified in particular respects, may now disregard * * * the case made by it and consider its application on a comparative basis with subsequent applications on records made after the Commission's original decision." 105 F. 2d at 39.

In reversing the lower court's grant of mandamus, this Court delineated the respective functions of reviewing court and administrative agency, pointing out that the sole function of the court is to correct errors of law which may have occurred in the administrative proceeding. On remand the agency is bound to act upon that correction. Such a correction, however, does not foreclose the agency from enforcing the legislative policy committed to its charge—in the present case that of granting authority to engage in air transportation according to the requirements of public convenience and necessity. Here, as in *Pottsville,* if the administrative agency erred, the Court will lay bare that error, and on remand the Board will be "again charged with the duty of judging the application [of State] in the light of 'public convenience, interest, or necessity'" (309 U. S. at 145). *Cf. Securities and Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194.

State contends that jurisdiction to order the Board to award it a certificate is conferred by Section 10 (e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009. But the foregoing principles of law have not been altered by that section. A reviewing court is there authorized to "compel agency action unlawfully withheld" but this power, like all other powers granted by Section 10, is subject to two express statutory exceptions. Review is permitted "Ex-

cept so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

The present case clearly falls with the second category. Section 401 (d) (1) of the Civil Aeronautics Act (49 U. S. C. § 481) explicitly commits to the Board the policy determination as to whether the particular transportation "is required by the public convenience and necessity." The court below correctly held that there is no warrant in the Administrative Procedure Act for assumption by a court of the function of making such a discretionary determination. Compare *McGrath* v. *Zander*, October 10, 1949, C. A. D. C.[28] And we have already pointed out that the contention in the present case that the discretionary decisions have been irrevocably made, so that the remaining function is ministerial, is directly refuted by this Court's decision in the *Pottsville* case. The legislative history of Section 10 makes clear that the principle of that case was intended to be left unimpaired by the section.

The Attorney General, in his comments to the Senate Committee on the Judiciary on the bill

[28] In the *Zander* case the Court of Appeals reversed a judgment directing the return of property seized under the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1 *et seq.* The judgment had purportedly rested on a section of that Act permitting return only if the President determined such return to be "in the interest of the United States" (50 U. S. C. App. 32) and no such determination had been made.

which became the Administrative Procedure Act, stated that Section 10 (e):

> * * * declares the existing law concerning the scope of judicial review. The power of the court to direct or compel agency action unlawfully withheld or unreasonably delayed is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (309 U. S. 134).[29]

Since these comments by the Attorney General were included in the Committee's report, they serve as an indication of the Committee's opinion of the intended effect of clause (A) of Section 10 (e). *American Stevedores* v. *Porello*, 330 U. S. 446, 452. Further, the legislative history is replete with other instances in which the Congress clearly demonstrated that it intended by Section 10 (e) only to restate existing law, and that clause (A) of that section relating to the compelling of agency action was not intended to substitute the discretion of the courts for that of the agencies.[30] The language of Section 10 (e)

[29] Senate Report No. 752, Report to Accompany S. 7, Committee on the Judiciary, 79th Cong., 1st Sess. (Administrative Procedure Act, Legislative History, Senate Document 248, 79th Cong., 2nd Sess., p. 230.)

[30] See *id.*, pp. 40, 214, 278, 323, 415.

is clearly concerned with compelling an agency to take *some* action on pending matters, rather than with compelling a particular result.[31]

The principles of law embodied in the *Pottsville* case, unaffected by the Administrative Procedure Act, clearly preclude a judicial directive that the Board certificate State even if it is determined that the Board erroneously certificated Piedmont. The court below correctly refused to depart from these principles.

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[31] The purpose of clause (A) of Section 10 (e) has been effectively summarized as follows:

"Clause (A) authorizing a reviewing court to 'compel agency action unlawfully withheld or unreasonably delayed,' appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 U. S. C. 377). *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278 (E. C. A., 1943), certiorari denied, 320 U. S. 797. The power thus stated is vested in 'the reviewing court,' which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action. See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943). Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown*, *supra*, or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel Humboldt Steamship Co.*, 224 U. S. 474 (1912), or to compel an agency or officer to perform a ministerial or non-discretionary act. Clause (A) of section 10 (e) was apparently intended to codify these judicial functions." *Attorney General's Manual on the Administrative Procedure Act* (1947) p. 108.

CONCLUSION

For the foregoing reasons the judgment should be reversed with directions that the orders of the Civil Aeronautics Board be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

HERBERT A. BERGSON,
Assistant Attorney General.

PHILIP ELMAN,
J. ROGER WOLLENBERG,
Special Assistants to the Attorney General.

EMORY T. NUNNELEY, JR.,
General Counsel.

WARREN L. SHARFMAN,
O. D. OZMENT,
Attorneys,
Civil Aeronautics Board.

November, 1949.

APPENDIX A

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] are as follows:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

CERTIFICATE REQUIRED

SEC. 401 (a). No air carrier shall engage in any air transportation unless there is in force a certificate issued by the [Board] authorizing such air carrier to engage in such transportation: * * *

APPLICATION FOR CERTIFICATE

(b) Application for a certificate shall be made in writing to the [Board] and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the [Board] shall by regulation require.

NOTICE OF APPLICATION

(c) Upon the filing of any such application, the [Board] shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the [Board] and to such other persons as the [Board] may by regulation determine. Any interested person may file with the [Board] a protest or memoran-

[1] Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

dum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the [Board] shall dispose of such application as speedily as possible.

ISSUANCE OF CERTIFICATE

(d) (1) The [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the [Board] may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder.

The pertinent provisions of the Administrative Procedure Act[2] are as follows:

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency

[2] Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*

action is by law committed to agency discretion—

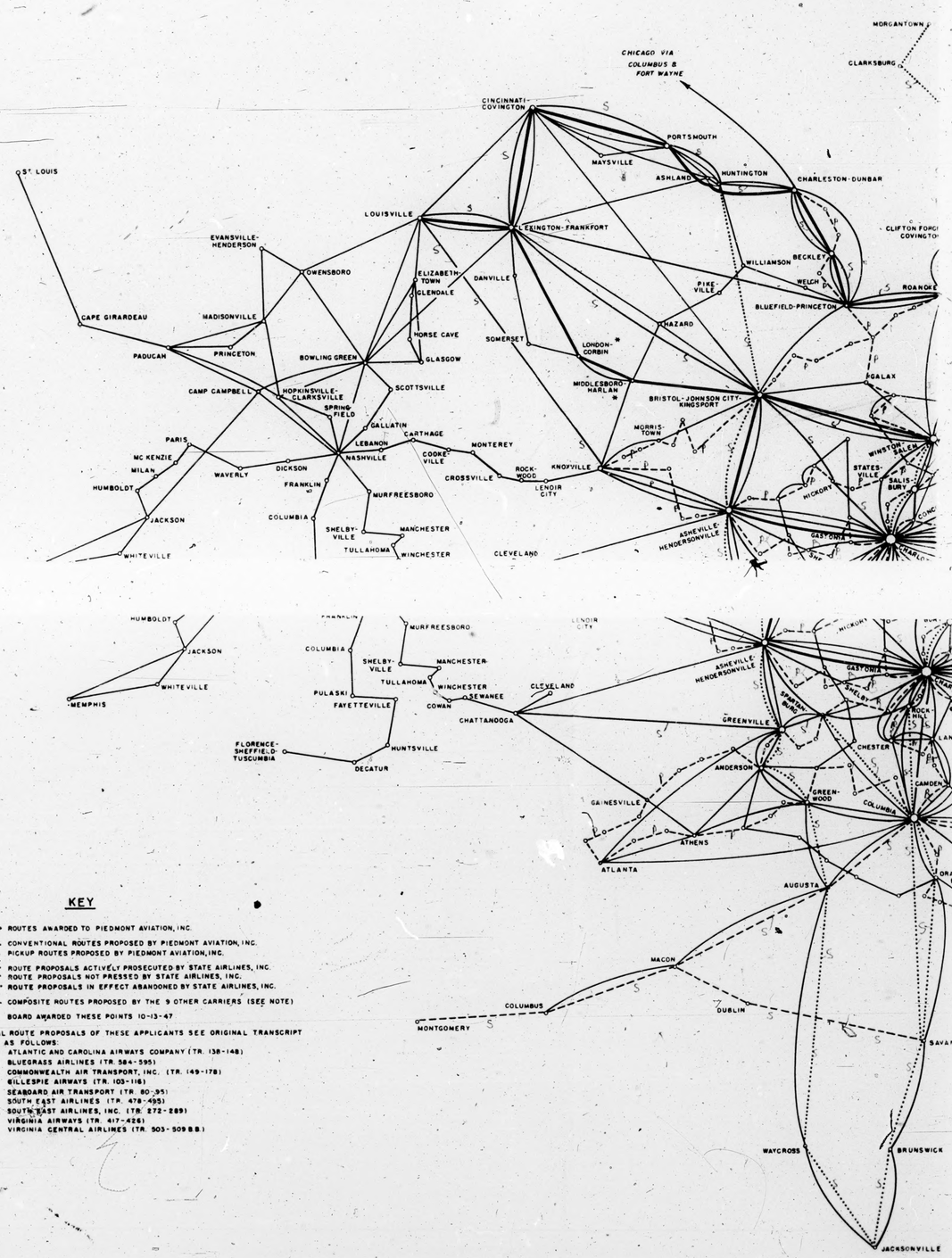
(a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

COMPARISON BETWEEN ROUTE AWARDED BY BOARD AND PROPOSED ROUTES OF 11 APPLICANTS CONSIDERED FOR AWARD OF BOARD'S ROUTE



KEY

- ROUTES AWARDED TO PIEDMONT AVIATION, INC.
- PIEDMONT — CONVENTIONAL ROUTES PROPOSED BY PIEDMONT AVIATION, INC.
- PIEDMONT — PICKUP ROUTES PROPOSED BY PIEDMONT AVIATION, INC.
- STATE — ROUTE PROPOSALS ACTIVELY PROSECUTED BY STATE AIRLINES, INC.
- STATE — ROUTE PROPOSALS NOT PRESSED BY STATE AIRLINES, INC.
- ROUTE PROPOSALS IN EFFECT ABANDONED BY STATE AIRLINES, INC.
- COMPOSITE ROUTES PROPOSED BY THE 9 OTHER CARRIERS (SEE NOTE)
- * BOARD AWARDED THESE POINTS 10-13-47

NOTE: FOR INDIVIDUAL ROUTE PROPOSALS OF THESE APPLICANTS SEE ORIGINAL TRANSCRIPT OF RECORD AS FOLLOWS:

ATLANTIC AND CAROLINA AIRWAYS COMPANY (TR. 138-148)
BLUEGRASS AIRLINES (TR. 584-595)
COMMONWEALTH AIR TRANSPORT, INC. (TR. 149-178)
GILLESPIE AIRWAYS (TR. 103-116)
SEABOARD AIR TRANSPORT (TR. 80-95)
SOUTH EAST AIRLINES (TR. 478-495)
SOUTH EAST AIRLINES, INC. (TR. 272-289)
VIRGINIA AIRWAYS (TR. 417-426)
VIRGINIA CENTRAL AIRLINES (TR. 503-509 B.B.)

CIVIL AERONAUTICS BOARD

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